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81-332

No.

IN THE

Supreme Court of the United States

October Term, 1981

GLASGOW, INC.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
and RAYMOND WILLIAMS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Did not the courts below err in ruling that contractors are vicariously liable under 42 U. S. C. § 1981 for a union's racially discriminatory hiring-hall referrals to them where the contractors neither knew nor had reason to know of the discrimination?

II. Did not the courts below err in ruling that contractors are vicariously liable under such circumstances where also those contractors neither had control of nor the right to control the referrals and where those discriminatory referrals were in direct breach of a racially-neutral hiring-hall provision in effect between the union and the contractors?

III. Did not the courts below err in making Glasgow subject to a far-reaching mandatory injunction to remedy the union's discrimination and also imposing upon Glasgow a substantial financial obligation in connection with that injunction?

PARTIES IN THE COURT OF APPEALS

The parties in the Court of Appeals were:

1. Raymond Williams
   Willie McKay
   Marion J. Eaddy
   Randolph Hughes, Jr.
   Arel Brownlee
   William Bostic
   Kenneth Howard
   Alpha Christmas
   Ronald Richardson
   Clarence Winder
   Ronald Crawford
   Frank Gilchrist

who were plaintiffs below, respondents in this Court, and class representatives of more than 1,000 persons;

2. The Commonwealth of Pennsylvania which was a plaintiff below and a respondent in this Court;

3. Local 542, International Union of Operating Engineers which was a defendant below but not a petitioner to this Court;

4. Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania and the State of Delaware which was a defendant below, but not a petitioner to this Court;

5. The General Building Contractors Association, Inc., Contractors Association of Eastern Pennsylvania, and United Contractors Association which were defendants below and separate petitioners to this Court;

6. Glasgow, Inc. which was a defendant below, petitioner to this Court, and class representative of approximately 1,400 contractors; and

7. Bechtel Power Corporation and United Engineers & Constructors, Inc. which were class members but not parties below and separate petitioners to this Court.

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COMMONWEALTH OF PENNSYLVANIA
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Glasgow, Inc. ("Glasgow") petitions this Court to review the judgment of the United States Court of Appeals for the Third Circuit entered on May 19, 1981.

OPINIONS IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Third Circuit for which review is sought is reported officially at 648 F. 2d 923. That decision affirmed a judgment of the United States District Court for the Eastern District of Pennsylvania, the opinion for which is officially reported at 469 F. Supp. 329.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was entered on May 19, 1981.

This Court has jurisdiction by virtue of 28 U. S. C. § 1254(1).

THE STATUTE INVOLVED

The following statute, 42 U. S. C. § 1981, is invclved in this case:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to the like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

This petition seeks review of a decision by the United States Court of Appeals for the Third Circuit sitting *en banc* which decision affirmed by an *equally-divided* vote a decision by the United States District Court for the Eastern District of Pennsylvania (J. A. 8; 9-212). These decisions, which were rendered under 42 U. S. C. § 1981, were that Glasgow and the approximately 1,400 other contractors in the defendant class are vicariously liable to a plaintiff class of more than 1,000 persons. The basis for the decisions is the use by Glasgow and the other contractors of an exclusive hiring hall operated in a discriminatory fashion by Local 542 of the International Union of Operating Engineers ("Local 542"). The Third Circuit affirmed the issuance of a far-reaching mandatory injunction which has required and will continue to require the expenditure by Glasgow of substantial monies.

In addition, in this case, the Third Circuit affirmed by an *equally-divided* vote decisions of vicarious liability under § 1981 against three contractor associations, which will be the subject of separate petitions to this Court. The Third Circuit also affirmed by *unanimous* vote holdings of liability for racial discrimination under Title VII of the Civil Rights Act of 1964 and § 1981 against Local 542 and its apprenticeship program, which holdings this Court will not be requested to review.

In 1961, Local 542 set out to impose on all contractors working within its jurisdiction (eastern half of Pennsylvania and Delaware) an exclusive hiring hall referral system by demanding in its labor negotiations that year inclusion of such a provision in its collective bargaining agreements. Only after a destructive ten-week strike was Local 542 successful, and thereupon Glasgow and the other contractors involved became legally obliged to obtain their operating engineers exclusively from the Local

542 hiring hall (J. A. 23). The hiring hall provision which was agreed upon is racially neutral (J. A. 30).

In breach of this lawful hiring-hall provision, Local 542 engaged in racial discrimination in the making of work referrals to contractors (J. A. 120). Glasgow and the other contractors who were required to use the hiring hall neither knew nor had reason to know of that discrimination (J. A. 168, 195, 198).

While holding Glasgow and the other contractors liable, the courts below nevertheless ruled that there was insufficient proof by the plaintiffs that either Glasgow or the other contractors had discriminated. The sole basis for the liability of Glasgow and the other contractors in the defendant class was that they, as they were legally obliged to do, used Local 542's hiring hall. The courts below deemed it immaterial that Glasgow and the other contractors who were required to use the hiring hall had nothing to do with its operation and neither knew nor had reason to know of the discrimination taking place therein (J. A. 168).

As will be more fully developed hereinafter, these unique and indeed extraordinary decisions by the courts below present very important questions of federal law, especially the question of the correct construction of § 1981 and particularly the proof of intent thereunder. These decisions if left undisturbed will have a profound adverse impact on the literally thousands of employers and the hundreds of thousands employees who are involved with those industries throughout the United States which utilize hiring halls. These decisions also create major conflicts with decisions and principles of this Court, as well as several of the circuits.[1]

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1. Other important errors by the courts below, including but not limited to the scope of the injunction, the propriety of a Fed. R. Civ. P. 23(b)(2) defendant class, the existence of *in personam* jurisdiction over defendant class members, and the failure to con-

REASONS FOR ALLOWANCE OF THE WRIT

I. This Case Presents Important Questions of Federal Law Which Have a Profound Impact Not Only on the Construction Industry But Also on All Those Industries Throughout the United States Which Utilize Hiring Halls.

Hiring halls are used in many industries throughout the United States. For example, they are common in the sprawling maritime industry, as well as being widely used in the giant construction industry. This Court has recognized the practical necessities and potential benefits to employers and employees alike in *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U. S. 667 (1961). In that case, this Court ruled that a hiring-hall provision which is racially neutral is a lawful contract provision.

With the question of the legality of hiring-hall provisions thus settled, the national labor policy then developed to a point where an employer who is faced with a collective bargaining demand for a hiring-hall provision is under substantial pressure to accede to that demand, especially after the ruling which confirmed that exclusive hiring halls are *not only lawful* but are *mandatory* subjects of collective bargaining.[2] Therefore, a union may bargain a demand for an exclusive hiring hall to impasse and strike therefor if it wishes to bring into operation the full pressure of its economic force.

The decisions by the courts below which are the subject of this petition plainly clash with this established

1. (Cont'd.)
sider individual work force characteristics of defendant class members, will be raised in this case by other petitioners to this Court.

2. *Houston Chapter, Associated General Contractors*, 143 NLRB 409 (1963), *enf'd*, 349 F. 2d 449 (5th Cir. 1965), *cert. denied*, 382 U. S. 1026 (1966).

national labor policy by discouraging any employer from agreeing to use a hiring hall. By imposing, as the courts below did, what amounts to *strict liability* on Glasgow and on the approximately 1,400 other contractors here involved who did not know or have reason to know of Local 542's discrimination, they give a strong inducement to any employer faced with a demand or the need for a hiring hall to avoid it almost at any cost. The alternatives would be either exposure to a risk of staggering and unknown financial liability or perhaps an attempt by the employer to control the hiring hall, which clearly is impractical and in any event likely would be itself a violation of federal law.[3] Thus, the unavoidable result of the decisions by the courts below is inconsistency, if not outright conflict, in major national labor policies, as well as uncertainty, conflict, and even labor strife in those industries which over the years have utilized hiring halls. This Court, therefore, should take jurisdiction of and review this case with a purpose of rectifying the departure by the courts below from settled federal principles which have a profound impact on such a substantial portion of the public.

In addition, the decisions by the courts below obviously raise important questions under a federal statute in which this Court has shown great interest, 42 U. S. C. § 1981. Since the decisions at bar clearly recognize that Glasgow and the other contractors neither knew nor had reason to know of Local 542's discrimination, it follows inexorably that Glasgow and the other contractors could not have had any discriminatory motive or intent. Therefore, it is fair and indeed accurate to conclude that liability under § 1981 was imposed on Glasgow and the other contractors without proof that they intended to discriminate. In fact, the courts below ruled that § 1981 does not require such proof.

3. 29 U. S. C. § 152(a)(1) and (2).

The question of whether § 1981 requires proof of discriminatory intent—in contra-distinction to Title VII of the Civil Rights Act of 1964[4]—has twice before been before this Court in *City of Memphis v. Greene*, 49 U. S. L. W. 4389 (U. S. 1981) and *County of Los Angeles v. Davis*, 440 U. S. 625 (1979). However, those cases were disposed of on other grounds. In no case has this precise issue been dealt with on the merits by this Court.

Furthermore, and as will be demonstrated in more detail below, the rulings by the courts below that § 1981 does not require proof of discriminatory intent are in direct conflict with decisions of six other circuits, as well as being in conflict with the principles established by this Court in *Washington v. Davis*, 426 U. S. 229 (1976).

Further to the construction of § 1981—and disregarding for the moment the question of discriminatory intent—the case at bar raises the very important threshold question of whether there can be *any* vicarious liability *at all* under § 1981 and if so under what circumstances. This Court ruled in *Monell v. Department of Social Services of the City of New York*, 436 U. S. 658 (1978) that municipal authorities cannot be held vicariously liable under 42 U. S. C. § 1983. More specifically, in *Monell*, in the concurring opinion of Mr. Justice Powell, it is stated that § 1983 contains ". . . a limitation of the statutory ambit to actual wrongdoers, i.e., a rejection of *respondeat superior* or any other principle of vicarious liability." *Monell, supra*, 436 U. S. at 707. It seemingly follows from *Monell's* limitation of liability under § 1983 to actual wrongdoers that § 1981 as well will not support vicarious liability. A reading of the two provisions *in pari materia* on the issue of vicarious liability is compelled both by this Court's opinion in *Monell* and by the basic purpose of § 1981, which is, as set forth heretofore, to prohibit only

4. *International Brotherhood of Teamsters v. United States*, 431 U. S. 324 (1977).

purposeful discrimination. In this regard, a major factor in the decision of *Monell* was Congress' rejection after heated debate of the proposed Sherman Amendment. That amendment would have made municipalities vicariously liable for the unlawful acts of its citizens. Obviously, the Reconstruction Congress was opposed in 1871 to vicarious liability in connection with § 1983. It is fair to infer that the Reconstruction Congress had no different view where, only a year before in 1870, it reenacted the related statute, § 1981.

In addition to the factors pointed out above, the courts below invoked the doctrine of *respondeat superior* and imposed vicarious liability on Glasgow and the other contractors even though it was quite clear that they neither controlled nor had the right to control the operation of the Local 542 hiring hall. Moreover, as a reserve theory for imposing vicarious liability, the courts below looked to the elusive principle of non-delegable duty, which is articulated in Restatement (2d) of Agency, § 214, and then read this into § 1981. Even if the limits of § 1981 are not sufficiently circumscribed to rule out vicarious liability, then this Court should settle the very significant question of federal law as to precisely when such liability is justified. In that regard, the plain departure by the courts below from the well-settled principles of *respondeat superior* in their construction of § 1981 clearly was erroneous and is in direct conflict with the principles of federal statutory construction set forth by this Court in *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571 (1981).

II. The Decisions Below Conflict With Decisions of Other Federal Courts of Appeals as Well as Applicable Decisions of This Court.

The courts below held squarely that § 1981 does not require proof of discriminatory intent. By so doing, the Third Circuit placed itself in direct conflict with decisions

in six other federal circuits and with dicta in at least two more. *City of Milwaukee v. Saxbe,* 546 F. 2d 693 (7th Cir. 1976); *Chicano Police Officer's Ass'n. v. Stover,* 552 F. 2d 918 (10th Cir. 1977); *Johnson v. Alexander,* 572 F. 2d 1219 (8th Cir.), *cert. denied,* 439 U. S. 986 (1978); *Donnell v. General Motors Corp.,* 576 F. 2d 1292 (8th Cir. 1978); *Guardians Ass'n. v. Civil Service Comm'n.,* 633 F. 2d 232 (2d Cir. 1980); *Grigsby v. North Mississippi Medical Center, Inc.,* 586 F. 2d 457 (5th Cir. 1978); *Detroit Police Officers' Ass'n. v. Young,* 608 F. 2d 671 (6th Cir. 1979); *Des Vergnes v. Seekonk Water Dist.,* 601 F. 2d 9 (1st Cir. 1979). In these cases, it is correctly recognized that § 1981, unlike Title VII, requires more proof than simply proof of disparate impact. Instead, they state that § 1981 requires for its violation a motive or intent to discriminate. This becomes critical in the case at bar when it is remembered that Glasgow and the other contractors neither knew nor had any reason to know of Local 542's discriminatory referrals, let alone their having the requisite motive or intent. Therefore, this Court should now resolve this major conflict of circuits and provide the definitive construction of § 1981 which is so much needed.

In addition, the rulings of the courts below that proof of discriminatory intent is unnecessary for a violation of § 1981 are in conflict with the principles announced by this court in *Washington v. Davis,* 426 U. S. 229 (1976). Although that case sets forth the standard of proof to show a violation of the Equal Protection clause, the message that it bears regarding § 1981 appears clear. Although it is true that several circuits have recognized that *Washington v. Davis* strongly suggests that § 1981 requires proof of discriminatory intent,[5] as stated above it is time

5. *Craig v. County of Los Angeles,* 626 F. 2d 659 (9th Cir. 1980); *Guardians Ass'n. v. Civil Service Comm'n.,* 633 F. 2d 232

that this Court clearly confirms that very important rule of federal law.

Further to the conflict of circuits created by the decisions of the courts below in reaching the rather astounding decisions that they did, the courts below relied upon a line of cases under the National Labor Relations Act as amended. In this line, they relied most heavily upon *Morrison-Knudsen Co., Inc. v. NLRB*, 275 F. 2d 914 (2nd Cir. 1960), *cert. denied*, 366 U. S. 909 (1961) for the proposition that an employer who uses a union hiring hall may be liable for the union's discrimination on account of union membership without regard to whether the employer knew or should have known of the union's discrimination. Although it is clear that the courts below misinterpreted *Morrison-Knudsen*,[6] that is unimportant to the instant issue of the granting of this petition because other circuits which have considered the question require knowledge by the employer as a predicate for any liability for union discrimination. *E.g., NLRB v. Master Stevedores Association*, 418 F. 2d 140 (5th Cir. 1969) and *Lummus Co. v. NLRB*, 339 F. 2d 728 (D. C. Cir. 1964). Therefore, when the Third Circuit ruled that it is immaterial whether Glasgow and the other contractors knew or had reason to know of Local 542's discrimination, it drew itself into direct conflict with at least the Fifth and the District of Columbia Circuits on this important question of federal law. As with others, this conflict should now be resolved by this Court.

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5. (Cont'd.)
(2d Cir. 1980); *Chicano Police Officer's Ass'n. v. Stover*, 552 F. 2d 918 (10th Cir. 1977).

6. As the Fifth Circuit correctly recognized, in *Morrison-Knudsen* the employer had knowledge of the union's discrimination. *NLRB v. Master Stevedores Assoc.*, 418 F. 2d 140, 142 (5th Cir. 1969).

Finally, the decisions of the courts below appear to conflict even with the few cases which deal with employer or association liability for union discrimination on the basis of race in a hiring-hall setting. *Vogler v. McCarty, Inc.*, 294 F. Supp. 368, 374-75 (E. D. La. 1968), *aff'd sub nom. Heat & Frost Insulators & Asbestos Workers v. Vogler*, 407 F. 2d 1047 (5th Cir. 1969); *Allen v. Pipefitters Local Union No. 208*, 56 F. R. D. 473 (D. Colo. 1972); and *McFadden v. Baltimore Steamship Trade Association*, 8 BNA FEP Cases 391, 393 (D. Md. 1972). In each of these cases, the employers and associations were held *not* liable, while the courts never even inquired into the question of knowledge by the employers or associations.

Finally, it is also noted that monetary "injunctive" relief ordered against the Petitioners by the district court and affirmed by Third Circuit conflict with well-established principles of this Court. As previously noted, there simply is no basis in equity for the district court's imposition of such an extreme monetary remedy against the Petitioners herein. As this Court has emphasized, the scope of the equitable remedy must be determined by the nature of the violation. *Swan v. Charlotte-Mecklenburg Board of Educ.*, 402 U. S. 1 (1971); *Milliken v. Bradley*, 418 U. S. 717 (1974). Similarly, the imposition by the courts below of a monetary "injunction" against the non-discriminating Petitioner trade associations herein is in conflict with the decisions of at least two other circuit courts. *City Bank v. Rivera Davila*, 438 F. 2d 1367, 1371 (1st Cir. 1971); *Rios v. Enterprise Ass'n Steamfitters*, 400 F. Supp. 993 (S. D. N. Y. 1975), *aff'd sub nom. EEOC v. Enterprise Ass'n Steamfitters*, 542 F. 2d 579 (2d Cir. 1976), *cert. denied*, 430 U. S. 911 (1977).

CONCLUSION

Since this case presents questions in respect of important matters of federal law which have a wide impact and presents conflicts with decisions of at least six other circuits, this Court should grant this petition, take jurisdiction of this case, and review the questions presented.

Respectfully submitted,

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF ON BEHALF OF PETITIONER GLASGOW, INC.

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QUESTIONS PRESENTED

1. Whether 42 U. S. C. § 1981 requires for its violation a finding of an intent to discriminate?

2. Whether, under 42 U. S. C. § 1981, a contractor may be liable for discrimination by a union where the contractor neither knew nor had reason to know of the discrimination?

3. Whether, under 42 U. S. C. § 1981, there can be vicarious liability by virtue of *respondeat superior* where the principal does not have either control or the right to control?

4. Whether 42 U. S. C. § 1981 creates a non-delegable duty to insure that others refrain from discrimination?

5. Whether under the circumstances of this case a non-wrongdoing contractor can be subjected to a far-reaching injunction which imposes, *inter alia*, substantial financial obligations on the contractor but which was issued only because of discriminatory conduct by a union?

PARTIES IN THE COURT OF APPEALS *

The parties in the court of appeals were:

Plaintiff-Appellees:

(a) the Commonwealth of Pennsylvania; and,

(b) twelve individuals (Messrs. Raymond Williams; Wille McKay; Marion J. Eaddy; Randolph Hughes, Jr.; Arel Brownlee; William Bostic; Kenneth Howard; Alpha Christmas; Ronald Richardson; Clarence Winder; Ronald Crawford; Frank Gilchrist) on their own behalf and as representatives of a class of similarly situated individuals.

Named Defendant-Appellants:

(a) Local 542, International Union of Operating Engineers, AFL-CIO;

(b) the Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania, and the State of Delaware;

(c) four contractor associations: the Contractors Association of Eastern Pennsylvania, the United Contractors Association, the General Building Contractors Association, Inc., and Pennsylvania Excavating Contractors Association on behalf of themselves and as representatives of a defendant class of employer associations (all but the Pennsylvania Excavating Contractors Association are petitioners in this Court);[1] and,

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* All references to the Appendix to Petitions for Certiorari will be designated by "PA. —"; all references to the Joint Appendix on Writ of Certiorari will be designated by "JA. —".

1. The Pennsylvania Excavating Contractors Association dissolved in 1972 (PA. 29). In fashioning its decree, although the district court imposed a specific financial obligation of ten-percent (10%) on each of the other three named associations, it allocated no percentage of the total costs under the decree to the Pennsylvania Excavating Contractors Association.

(d) Glasgow, Inc., on behalf of itself and as the representative of a defendant class of employers.

Non-Party Members of Defendant Class-Appellants:

(a) Bechtel Power Corporation; and,

(b) United Engineers & Constructors, Inc.

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No. 81-332

IN THE

Supreme Court of the United States

GLASGOW, INC.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, and RAYMOND WILLIAMS, et al.,

Respondents.

BRIEF ON BEHALF OF PETITIONER GLASGOW, INC.

OPINIONS BELOW

District Court

The opinion of the United States District Court for the Eastern District of Pennsylvania setting forth the findings of fact and conclusions of law respecting liability is officially reported at 469 F. Supp. 329 (PA. 9). The district court also issued a separate judgment and decree, which was accompanied by a supplemental opinion. The judgment and decree (PA. 228) is not officially reported. The supplemental opinion is officially reported at 488 F. Supp. 988 (PA. 213).

Court of Appeals

Argument on appeal was initially heard by a panel of three judges in the United States Court of Appeals for the Third Circuit. Before a decision was issued, the court ordered reargument *en banc*. Following reargument before six of the active judges, the judgment of the district court, because of an equally-divided vote, was affirmed. The one-sentence *per curiam* opinion of the court is officially reported at 648 F. 2d 923 (PA. 8).

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1981. A timely petition for a writ of certiorari was filed by petitioner in No. 81-332 on August 17, 1981. On October 19, 1981, this Court granted the petition. This Court has jurisdiction by virtue of 28 U. S. C. § 1254(1).

THE PROVISIONS INVOLVED

The following statute, 42 U. S. C. § 1981, is involved in this case:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to the like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The following pertinent sections of the Fourteenth Amendment are involved in this case:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

This case involves an exclusive union hiring hall or referral system which was conceived and imposed by collective bargaining on construction contractors by Local 542, International Union of Operating Engineers ("Union"). The jurisdiction of the Union is the eastern half of Pennsylvania and the State of Delaware. The provision in the Union's collective bargaining agreements relating to the referral system is racially neutral on its face and otherwise lawful (PA. 30).

The case was bifurcated for trial into liability and back-pay phases. The back-pay phase has not yet taken place. The case was tried as a class action both on the plaintiffs' side and on the defendants' side (PA. 17-18). The twelve individual black plaintiffs are class representatives for all persons similarly situated. Glasgow, a suburban Philadelphia construction contractor, was made the class representative for contractors (sometimes estimated at 1,400) who, like Glasgow, were required to use the Union's referral system. Four associations of construction contractors were made class representatives for other associations who were involved in collective bargaining negotiations with the Union. These four associations are: the Contractors Association of Eastern Pennsylvania, which is a Pennsylvania non-profit corporation ("CAEP"); the United Contractors Association, a loosely-knit unincorporated contractor association ("UCA"); the General Building Contractors Association, Inc., which is a Pennsylvania non-profit corporation ("GBCA"); and the Pennsylvania Excavating Contractors Association, which was dissolved in 1972 ("PECA") (PA. 14-15, 29).

The district court, through the Honorable A. Leon Higginbotham, Jr., determined that the Union's referral system was intentionally operated by the Union in a ra-

cially-discriminatory fashion, in direct violation of its collective bargaining agreement and of 42 U. S. C. § 1981, as well as in violation of Title VII of the Civil Rights Act of 1964 (PA. 120, 164-65).

That court also held that Glasgow and the contractors in the class that it represents who, because of their legal obligation to do so, used the Union's referral system, and the CAEP, UCA, and GBCA, as well as the associations in the class that they represent, are vicariously liable under § 1981, notwithstanding its findings that Glasgow, the other contractors, and the associations neither knew nor had reason to know of the Union's discrimination. It also found that there was a failure to prove that Glasgow or the associations intended to discriminate. The district court further found that neither Glasgow nor any contractor or any association directly violated § 1981 (PA. 168, 195-96, 198, 212).[2]

The court of appeals affirmed unanimously the district court's holding against the Union, but then divided equally on the issue of the liability of the contractors and associations, thereby affirming the district court (PA. 9).

Through 1961, any contractor, including Glasgow, which had the legal duty to bargain and had a collective bargaining agreement with the Union was free to obtain qualified operating engineers from any available source (PA. 23). However, in 1961 the Union set out to impose on all contractors working within its jurisdiction an exclusive hiring-hall referral system by demanding in its labor negotiations that year the inclusion of such a system

2. The district court determined that there was not before it any claim under Title VII against either the associations or Glasgow. This determination is implied in the opinion of the court, and is fully supported by the uncontested fact that the associations and Glasgow were not parties to any charge before the Equal Employment Opportunity Commission, a prerequisite to an action in a federal court under Title VII (PA. 331).

in its collective bargaining agreement (PA. 23). If imposed, this system would require any employer who had the duty to bargain with the Union to use the Union as its sole and exclusive source for operating engineers (PA. 24-26).

These negotiations with the Union in 1961 were taking place on several fronts throughout the Union's work jurisdiction. Included among these were Delaware, where a Delaware contractors association was negotiating with the Union on behalf of contractors represented by it, and Philadelphia, where the CAEP [3] and GBCA were negotiating with the Union on behalf of contractors represented by them (PA. 23). Although there was severe opposition to the Union's demand for an exclusive referral system, the employers were informed by the National Labor Relations Board that they, through their representatives, were subject to a legal duty to bargain in good faith with the Union in respect of this demand because it is a mandatory subject of collective bargaining (JA. 306).

The persistence of the Union for the exclusive hiring-hall provision and the severe opposition of the contractors, through their representatives, eventually were transformed into a bargaining impasse over the referral-system issue, and a strike, which the district court characterized as "destructive," ensued. This strike lasted for ten weeks (PA. 23). In the face of this strike, and, as the district court found, with the "prospect of serious adverse economic consequences" if the strike continued, and also confronted with the reality that the "Union would not compromise for any other hiring alternative", the associations finally surrendered to the Union's exclusive referral demand (PA. 21, 23).

3. Glasgow had assigned its bargaining rights to the CAEP. Likewise, the UCA had assigned to the CAEP the bargaining rights of its members.

In the negotiations for their next collective bargaining agreement in 1963, the contractors, through their representatives, which included CAEP and GBCA, unsuccessfully attempted to oust the referral system from the collective bargaining agreement with the Union. Once again, however, the Union struck over this issue, and after another serious and lengthy strike, the contractors again were forced to capitulate (JA. 310).

At this juncture, it is most important to understand: (i) that the district court correctly found that "[t]he hiring hall system is on its face neutral"; and (ii) that the intentional discrimination which the district court found was practiced by the Union in the actual operation of the referral system was *in violation of*, and *not in compliance with*, the rules spelled out in the collective bargaining agreement for operation of that racially-neutral system [4] (PA. 30). In fact, the district court had this to say concerning the Union's actual operation of the referral system: "The union procedures in general constituted a motley fabric of arbitrary departures from the rules" (PA. 120).

In substance, the 1961 exclusive referral system has remained in the Union's collective bargaining agreement continuously to the present date.[5] Therefore, in that period, any and all of the more than fourteen-hundred contractors who have functioned under the Union's collective bargaining agreement, including Glasgow, have

4. Briefly summarized, except for certain specific limited situations, the referral system under the agreement was basically a "FIFO" (first in, first out) system, provided the individual seeking referral asserted that he was able to operate the piece of equipment for which the contractor was requesting an operator.

5. Because of its size, the Union is divided into five districts, and there is a separate hiring hall for each district. One covers the five-county Philadelphia area. Another covers the State of Delaware. The other three cover the remaining twenty-nine counties in eastern Pennsylvania (PA. 28-29).

been required to use the exclusive referral system (PA. 24-26). But, as the district court found, these defendant-class contractors—including Glasgow—did so without any knowledge or reason to know that the Union was violating the contractual rules for the referral system and by so doing was giving rise to the disparate racial impact which forms the basis for the decision by the district court against the Union (PA. 168).

Notwithstanding these now unchallenged findings, the district court held that Glasgow and the defendant-class contractors were vicariously liable under § 1981 for the Union's discrimination, this vicarious liability being based on the simple fact that they "relied contractually upon the hiring hall" (PA. 168). A similar holding was made for the associations based solely on the even more insignificant fact that they "participated in the creation or approval of an exclusive hiring hall provision", albeit that such provision was neutral on its face and only in its violation by the Union did the discrimination take place (PA. 128).

Immediately following the issuance of the opinion by the district court on January 2, 1979, Glasgow and the CAEP, UCA, and GBCA, among others, requested the Union immediately to remove the referral-system provision from the collective bargaining agreement. The purpose for this request was to terminate any potential future liability to the contractors as a result of their use of the referral system. When the Union refused to comply with the request, the grievance machinery of the collective bargaining agreement was invoked on behalf of the contractors. A final and binding decision by labor arbitrator Jay Kramer ruled that in view of the district court's decision, Glasgow and other employers did not have any further obligation under the agreement to use the Union's referral system. Upon a motion made by the Union im-

mediately following this decision, the district court overrode this ruling and enjoined the contractors, including Glasgow, to continue the use of the referral system, while imposing a racial quota on the referrals made by the Union (JA. 380-84).

In its judgment and decree, the district court mandated extensive and far-reaching injunctive five-year relief against all fourteen-hundred or more contractors, including Glasgow, as well as the associations. This mandatory injunction required, *inter alia,* minority hiring quotas upon all contractors, the implementation of skills training and upgrading programs for minorities, and a vast network for monitoring and auditing employer reporting of minority utilization (PA. 234-35, 241-44, 247-50). Under subsequent supplements to the decree, the district court ordered Glasgow to pay 5% of the total expenses incurred in supporting the ongoing injunctive program imposed upon the Union and all contractors with whom it had a collective bargaining relationship. Through the first year of this five-year mandated program, the total expense has been approximately $200,000 [6] (PA. 285).

6. Moreover, in its judgment and decree, the district court awarded reasonable attorneys' fees and costs to the named plaintiffs and Commonwealth (PA. 251). Counsel for the plaintiffs and Commonwealth have already requested the district court for an initial award of counsel fees for services through March, 1980, of over $1 million dollars and are seeking that said award be imposed jointly and severally among the named defendants.

SUMMARY OF ARGUMENT

1. Of the many cases cited by the district court in its liability opinion, none supports the vicarious liability decision against Glasgow made by that court and affirmed through the equally-divided vote of the court of appeals. The district court cited a line of cases under the National Labor Relations Act, the leading of which is *Morrison-Knudsen Co., Inc. v. NLRB*, 275 F. 2d 914 (2d Cir. 1960), *cert. denied*, 366 U. S. 909 (1961) (PA. 169-73). This line was cited for the proposition that an employer may be held liable for a union's hiring-hall discrimination even though the employer did not have knowledge of the discrimination. The district court misread these cases, including *Morrison-Knudsen*. Instead, these cases, which actually support Glasgow's position here, require that in such a case no liability may be imposed on an employer who neither knew nor had reason to know of the union's discrimination.

2. In addition, the line of cases cited by the district court which held a union and an employer jointly liable for the racially disparate impact of a facially-neutral seniority provision in a collective bargaining agreement is inapposite (PA. 181-86). In those cases, the disparate impact resulted from a performance of the agreement in the manner *intended* by the parties thereto. In the case at bar, the disparate impact, which is the basis for the decisions by the courts below, resulted from a *breach* by the Union of the agreement, thereby frustrating the result intended for the facially-neutral referral-system provision. And, in any event, the vitality was removed from this line of cases by the decision of this Court in *International Brotherhood of Teamsters v. U. S.*, 431 U. S. 324 (1977).

3. The courts below incorrectly applied the doctrine of *respondeat superior* to reach their vicarious liability

decision. Glasgow—and for that matter any other contractor—neither controlled nor had the right to control the Union's operation of its referral system. Therefore, the Union *vis a vis* Glasgow was at most an independent contractor, for whose torts Glasgow cannot be liable.

4. 42 U. S. C. § 1981 does not create, as was held by the courts below, a so-called non-delegable duty, which they did not define but which it may be inferred is for Glasgow to insure that the Union refrain from denying equal rights in the operation of the Union's referral system. The language of the statute itself and its legislative history do not support such an interpretation. Likewise, sound policy considerations dictate that no such duty exists. This Court has approved the use of referral systems in the construction industry. *Teamsters Local 357 v. NLRB,* 365 U. S. 667 (1961). Federal labor policy has favored their use by making exclusive referral systems mandatory subjects of collective bargaining, thereby conferring upon unions the right to strike to impose them upon an employer. *NLRB v. Houston Chapter, Associated General Contractors of America, Inc.,* 349 F. 2d 449 (5th Cir. 1965). However, the interpretation given § 1981 by the courts below incorporates into the legal fabric this harmful incongruity: an employer virtually may be forced to accept and use a union's referral system and then may be held absolutely liable for discrimination by the union in the operation of the system, even where that employer neither knew nor had reason to know of the discrimination.

5. But even if § 1981 does contain a non-delegable duty that an employer like Glasgow must insure that a union refrain from denying equal rights in the operation of an exclusive referral system, Glasgow could not have breached that duty in this case. This Court in *Washington v. Davis,* 426 U. S. 229 (1976) held that the Fourteenth

Amendment requires for its violation an intent to discriminate. § 1981 has a close relationship to the Fourteenth Amendment. For this reason, as well as its language and legislative history and sound policy considerations, this Court should hold that § 1981 also requires for its violation a finding of an intent to discriminate. In view of the finding below that there was a failure to prove that Glasgow intended to discriminate, Glasgow could not have violated § 1981 (PA. 168, 195, 198, 212).

6. The courts below did not find that Glasgow directly violated § 1981. Instead, they concluded only that Glasgow is vicariously liable for the discrimination committed by the Union (PA. 195-96). Notwithstanding, Glasgow, together with other employers, was enjoined to attain specific hiring quotas over a five-year period and to participate in and to pay substantial monies to finance reporting, training, and upgrading programs. Since this Court has instructed that any federal-court injunction should not exceed in scope the wrong sought to be remedied, Glasgow should be relieved of any obligation under any decree in this case. *Dayton Board of Education v. Brinkman*, 433 U. S. 406, 420 (1977).

ARGUMENT

The decision by the district court, as affirmed by the court of appeals, in respect of Glasgow was relatively simple and uncomplex: Glasgow is vicariously liable[7] for the discrimination by the Union because Glasgow "relied contractually upon the hiring hall" (PA. 128). The courts below found this liability even though the district court made the now unchallenged finding of fact that Glasgow neither knew nor had reason to know of the Union's discrimination (PA. 168).

Upon examination of the lengthy liability opinion of the district court, it becomes apparent that that court was

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7. This case raises the threshold question of whether there can be any vicarious liability at all under § 1981. This Court ruled in *Monell v. Department of Social Services of the City of New York*, 436 U. S. 658 (1978) that municipal authorities cannot be held vicariously liable under 42 U. S. C. § 1983. More specifically, in *Monell*, in the concurring opinion of Mr. Justice Powell, it is stated that § 1983 contains "a limitation of the statutory ambit to actual wrongdoers, i.e., a rejection of *respondeat superior* or any other principle of vicarious liability." *Monell, supra*, 436 U. S. at 707. It seemingly follows from *Monell's* limitation of liability under § 1983 to actual wrongdoers that § 1981 as well may not support vicarious liability. A reading of the two provisions *in pari materia* on the issue of vicarious liability is compelled both by this Court's opinion in *Monell* and by the basic purpose of § 1981, which is, as set forth herein, to prohibit only purposeful discrimination. In this regard, a major factor in the decision of *Monell* was Congress' rejection after heated debate of the proposed Sherman Amendment. That amendment would have made municipalities vicariously liable for the unlawful acts of its citizens. Obviously, the Reconstruction Congress was opposed in 1871 to vicarious liability in connection with § 1983. It is fair to infer that the Reconstruction Congress had no different view where, only a year before in 1870, it reenacted the related statute, § 1981.

relying upon four separate bases for its vicarious liability ruling:

> (1) that which the district court referred to as "analagous National Labor Relations Act cases";
>
> (2) that which the district court referred to as "Title VII cases in which an employer's agreement to a facially neutral hiring hall system [sic] [8] had a discriminatory impact";
>
> (3) that which the district court referred to as "cases and principles relating to the applicability of *respondeat superior* liability under § 1981"; [9] and
>
> (4) perhaps what should be a subheading under (3), the presence in § 1981 of some undefined nondelegable duty which the district court perceived by "[a]nalogy to Section 214 of the Restatement (second) of Agency." [10]

When these bases are subjected to scrutiny, it quickly becomes obvious that whether taken individually or collectively, they do not lend any support whatever to the conclusion that Glasgow is liable for the discrimination committed by the Union.

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8. The cases cited by the district court involved facially-neutral *seniority* systems, not *hiring-hall* systems.

9. PA. 169.

10. PA. 192-93. In what purports to be a summary of the bases for the vicarious liability conclusion by the district court (PA. 169), there appears in (2) a reference to certain Title VII and § 1981 decisions. Although it may appear that these cases are used by the district court to ground liability, in fact that court, rather than relying on these cases, attempted to distinguish them.

I. The NLRA Cases Cited by the District Court Do Not Support the Imposition of Liability Upon Glasgow and Instead Require That Glasgow Be Held Not Liable.

The district court cited some cases decided under the National Labor Relations Act as support for its conclusion that Glasgow is vicariously liable for the Union's discrimination (PA. 169-73). The NLRA cases were cited by the district court because of its view that they held an employer liable for union-membership discrimination by a union in the operation of a referral system where the employer did not have knowledge or reason to know of the discrimination. A careful reading of these cases, however, reveals that the district court interpreted these cases incorrectly. Instead of the interpretation placed upon them, these cases require that no liability attach to an employer who neither knew nor had reason to know of discrimination being practiced by a union in its operation of a facially-neutral referral system. Since Glasgow neither knew nor had reason to know of the Union's discrimination, this line of cases requires that Glasgow be held not liable.

In this context, the district court relied virtually entirely upon one decision: *Morrison-Knudsen Co., Inc. v. NLRB*, 275 F. 2d 914 (2d Cir. 1960), *cert. denied*, 366 U. S. 909 (1961).[11] In that case, a union which operated

11. The district court also makes reference to the decision in *NLRB v. United States Steel Corp.*, 278 F. 2d 896 (3d Cir. 1960) in support of its notion that, under the NLRA, the action of a union agent may be chargeable to the employer principal on some type of vicarious liability theory. In *U. S. Steel*, however, the "union" agent, for whose discriminatory hiring decisions liability was imputed to the employer, was in fact a *supervisory employee* of the company and had been given the authority to act as a hiring agent.

an exclusive hiring hall discriminated against non-union individuals in referrals to an employer and forced non-union individuals to pay it a license fee known as "dobie". The court of appeals noted that the union acted as the employer's agent [12] in selecting the workers to be hired and that the union's discriminatory acts were properly chargeable to the employer as principal. The court stated, however, that it was clear that the employer knew of the illegal collection of the dobie and knew to some extent of the union's discriminatory referrals. 275 F. 2d at 917. The court of appeals therefore affirmed the findings of the NLRB that the employer had violated Section 8(a)(3) of the Act.

Despite these facts, the district court extrapolated from *Morrison-Knudsen* the sweeping proposition that under the NLRA, an employer is responsible, on some type of absolute liability basis, for the discriminatory acts which a union commits in the operation of an exclusive hiring hall from which that employer obtains applicants for employment without regard as to whether the employer knew or had reason to know of the discrimination. However, two other courts of appeals which have confronted the issue of the *Morrison-Knudsen* holding interpret that holding in a way diametrically opposed to the interpretation of the district court here. These courts have noted that *Morrison-Knudsen* involved a situation in which it was clear that the employer had some knowledge of the union's discrimination. *See NLRB v. Master Stevedores Association of Texas*, 418 F. 2d 140 (5th Cir. 1969); *Lummus Co. v. NLRB*, 339 F. 2d 728 (D. C. Cir. 1964). Furthermore, these courts expressly require that in order

12. Since the principal-agent relationship must be fiduciary in nature, as a matter of law a union never should be the agent of an employer. *See*, Restatement (2d) of Agency, § 1; 29 U. S. C. §§ 158(a)(1) and (2).

for liability to attach to such an employer, the employer must know or have reason to know of the union's discrimination. *Master Stevedores, supra,* 418 F. 2d at 142; *Lummus, supra,* 339 F. 2d at 737. *See also NLRB v. Southern Stevedoring and Contracting Co.,* 332 F. 2d 1017 (5th Cir. 1964). The principles which these NLRA cases enunciate are, if anything, *stricter* than traditional common-law concepts in the cautionary approach which they take toward finding any liability relationship between an employer and the union which refers workers to it. *See Lummus, supra,* 339 F. 2d at 735-37.

Thus, despite the reliance of the district court upon *Morrison-Knudsen,* neither that decision nor other judicial authority under the NLRA supports the conclusion that an employer may be held liable for the discriminatory acts of the union in the absence of knowledge or at least reason to know of the discrimination. Since the district court found that the employers neither knew nor had reason to know of the Union's discrimination, the NLRA authorities dictate that an employer such as Glasgow is *not* liable (PA. 168).

II. The Seniority-System Cases Relied Upon by the District Court Are Inapposite.

The second of the bases used by the district court to impose vicarious liability on Glasgow involves facially-neutral seniority-system provisions, the application of which resulted in an actionable discriminatory impact upon minorities under Title VII of the Civil Rights Act of 1964. These cases plainly are distinguishable from the matter at bar.

In these cases, decided prior to the decision of this Court in *International Brotherhood of Teamsters v. U. S.,*

431 U. S. 324 (1977),[13] employer liability arose *directly* from compliance with the terms of a facially-neutral seniority provision, the performance of which resulted in a discriminatory impact upon minorities (PA. 181-86). However, in these seniority cases, as the district court recognized, the discriminatory impact resulted from the performance of the collective bargaining agreement in the manner *intended* by the employer and the union. Liability in these cases, therefore, was assessed jointly against the employer and the union. In the instant case, however, the district court found that the discriminatory impact occurred because the Union acted in breach of the agreement (PA. 120). The court recognized that if the Union complied with the agreement, the hiring-hall provisions thereof would not have created any actionable discriminatory impact (PA. 30, 120). But it determined that only "a short conceptual step" is required to impose liability *vicariously* upon an employer which, although contractually bound to make use of the Union's referral system, had no knowledge or reason to know of the Union's acts of discrimination (PA. 186). Nothing in these cases supports the long conceptual leap which the district court strained to make in creating this vicarious theory of liability.

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13. The cases referred to are: *Myers v. Gilman Paper Corp.*, 544 F. 2d 837 (5th Cir.), *cert. dismissed*, 434 U. S. 801 (1977); *Carey v. Greyhound Bus Co.*, 500 F. 2d 1372 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F. 2d 1364 (5th Cir. 1974); *Robinson v. Lorillard Corp.*, 444 F. 2d 791 (4th Cir.), *cert. dismissed*, 404 U. S. 1006 (1971). These decisions reflect the state of the law prior to *Teamsters*, in which case this Court ruled that a bona fide seniority system which has a discriminatory impact upon minorities is exempt from liability by virtue of Section 703(h) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2(h).

III. Under Settled Legal Principles of *Respondeat Superior*, the Relationship Between Glasgow and the Union Is Insufficient to Support the Imposition of Vicarious Liability.

The third of the bases used by the district court to impose vicarious liability on Glasgow is a use of the doctrine of *respondeat superior*.[14] This doctrine makes a master liable for the torts of his servant acting within the course of his employment. Under well-settled master-servant principles, Glasgow may be liable to the plaintiffs in this action if it is determined that the Union was Glasgow's servant in the operation of the referral system and that the Union was acting within the course of its employment. If it is determined that the Union was not the servant of the master Glasgow, and therefore was at most an independent contractor, Glasgow may not be held vicariously liable under the doctrine of *respondeat superior* for any torts of the Union. *See* Restatement (2d) of Agency, § 219.

A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control. *Id.* at § 2(1). Therefore, if control of or the right to control the Union by Glasgow was absent, the Union was not the servant of Glasgow, but was instead at most an independent contractor. If an independent contractor, the general rule of *respondeat superior* is that Glasgow could

14. In the absence of specific language on the part of Congress to the contrary, federal courts must apply the traditional common-law rules of vicarious liability in interpreting federal statutes. *Amoco Oil Co. v. Environmental Protection Agency*, 543 F. 2d 270, 275-76 (D. C. Cir. 1976).

not be liable for any tort, including a violation of § 1981, of the Union.

The opinion of the district court clearly recognizes that Glasgow did not in fact control the Union's referral system. If Glasgow had that control, it arguably would have constituted an unfair labor practice under 29 U. S. C. §§ 158(a)(1) and (2). However, the district court appears to suggest that Glasgow and the other contractors retained some right to control the referral system. In what seems to be an analysis of the element of the right to control, the district court simply stated that the contractors were entitled to a hiring hall system which adhered to the terms of the collective bargaining agreement, one term of which prohibited racial discrimination (PA. 29-30, 192). Such an analysis, however, misapprehends the nature of the "right to control" test. That test focuses not on the principal's right to control the *results* of the other's performance, but rather on whether the principal retains the right to direct the other's manner of performance. *See Drexel v. Union Prescription Centers, Inc.*, 582 F. 2d 781, 785 (3d Cir. 1978).

Even as found by the district court, the facts indicate that an employer such as Glasgow did not have the right to control the Union's manner of achieving the ends specified in the collective bargaining agreement. Plainly, the mere recitation in the collective bargaining agreement of the details of the service which the Union was to provide an employer does nothing more than describe with a certain degree of specificity the *result* which the Union must achieve. In that respect, the hiring-hall provisions of the agreement are akin to an architect's specifications which are incorporated into the contract between an owner and a general contractor for the construction of a building. It is plain that an owner having no control over the day-to-day performance of the general contractor does not have a master-servant relationship with that contractor. *See,*

e.g., Lipka v. U. S., 369 F. 2d 288, 291 (2d Cir. 1966); *Peter v. Public Constructors, Inc.*, 368 F. 2d 111, 113 (3d Cir. 1966). Like that owner, an employer such as Glasgow had no participation in the day-to-day operation of any of the five Union-run hiring halls. As an employer, Glasgow would simply phone the appropriate Union hiring hall and inform the dispatcher on duty of its need for an operator. In return, an operator would show up for work as requested.[15]

Since Glasgow did not have the right to control the Union in the Union's operation of its referral system, no master-servant relationship existed between Glasgow and the Union. Glasgow, therefore, cannot be held liable under the doctrine of *respondeat superior* for the discriminatory acts of the Union, at most an independent contractor.

IV. § 1981 Does Not Create a Non-Delegable Duty, But if It Does It Could Not Have Been Violated by Glasgow in This Case.

The final one of the four bases used by the district court in its attempt to support its liability theory against Glasgow is that, by analogy to Restatement (2d) Agency, § 214, § 1981 should be interpreted as creating a so-called non-delegable duty which makes Glasgow liable. Although it refers to such a duty, the district court does not express precisely what that duty is.

To gain some understanding of the district court's ruling in this regard, it is helpful to focus on why it took

15. In addition, the district court pointed to the presence of a grievance procedure for complaints by *applicants* against the Union's operation of the hiring hall as an indicium of an *employer's* right to control the Union's performance. But it is obvious that a mechanism which inures to the benefit of an applicant and the application of which is triggered by the complaint of an applicant gives an employer *no right* of control at all.

this novel position. As previously set forth, there simply is no basis in the record of this case for a determination that the Union was the servant of Glasgow, which determination would have justified the conclusion that Glasgow, as master, is vicariously liable for the torts of the Union. Therefore, it is clear that the Union was at most an independent contractor in respect of Glasgow.

As previously set forth, the general rule is that a principal is not liable for the torts of an independent contractor. However, as recognized in § 214, as to a few somewhat unique fact patterns, a principal may be held liable for a failure by an independent contractor to discharge a duty *owed by the principal to a third party.* The duty found in these fact patterns is referred to as a non-delegable duty on the part of the principal.

Lacking any basis whatever to impose vicarious liability under the general rule, the district court reached out for the non-delegable duty exception, and then without precedent, analysis, or hesitation that court read a non-delegable duty into § 1981. Again, significant by its absence is any definition by the district court of the nature of the non-delegable duty that it had so easily created to impose liability.

A study of § 214 and of the district court's opinion reveals that what in substance the district court was concluding was that § 1981 contains not only a duty for an employer itself to refrain from denying equal rights in the employment process, but also, if that employer uses another to perform a portion of its employment process, then that employer is subject to a further duty to insure or guarantee that the other refrains from denying equal rights. Such an interpretation of § 1981 is not warranted (1) by the language of the statute itself and its legislative history; and (2) by compelling policy considerations.

At this juncture, it is important to understand that Glasgow is not contending that it may delegate or otherwise rid itself of the fundamental duty imposed by § 1981: the duty to refrain from denying to any person the same right as is enjoyed by white persons to make and enforce contracts. It is plainly recognized that Glasgow is subject to this duty created by § 1981, and that Glasgow through contract or otherwise cannot relieve itself of this duty. But this fundamental duty of § 1981 was not violated by Glasgow in this case, and the district court so ruled (PA. 168). What the district court did rule is that, although Glasgow did not itself discriminate, since § 1981 makes Glasgow an insurer for the conduct of the Union, when the Union discriminated, Glasgow became liable therefor (PA. 198). Under § 214, this liability of Glasgow is not vicarious, but instead is the breach by Glasgow of a duty owed by it directly to the plaintiffs, a duty stemming necessarily from § 1981 and referred to as non-delegable.

Before turning to a discussion of the reasons why § 1981 should not be interpreted as creating a non-delegable duty, if this Court were to conclude that § 1981 does create such a duty, it could not have been violated in this case by Glasgow. § 1981 plainly requires for its violation a finding of an intent to discriminate, and the district court made the unchallenged finding that there was a failure to prove that Glasgow intended to discriminate (PA. 195).

A. Neither the Language Nor the Legislative History of § 1981 Give Rise to a Non-Delegable Duty.

Any reading of § 1981 results in the conclusion that it does not create a non-delegable duty for one person to insure that others refrain from denying equal rights. The statute is an unparticularized declaration that all persons shall have the same right to make and enforce contracts as is enjoyed by white persons; it does not even identify any

person upon whom any duty falls. Nothing in § 1981 gives rise to an inference that anything even approaching the absolute liability which the district court imposed upon Glasgow was created by this broad but amorphous prohibition on racial discrimination.

When the district court read such a non-delegable duty into § 1981, and in light of the absence of any support in the legislative history of that statute, it plainly violated the rules for statutory construction so clearly defined by this Court in *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571 (1981). And, this interpretation by the district court likewise was contrary to the rule that a non-delegable duty may only be imposed upon an employer by statute "if the statute in question [is] of such a tenor as to subject him to a definite obligation in respect of the matter." *Williamson v. Southwestern Bell Telephone Co.*, 265 S. W. 2d 354, 357 (Mo. 1954); *see also Olds v. Pennsalt Chemicals Corp.*, 432 F. 2d 1033, 1035 (6th Cir. 1970).

B. Compelling Policy Considerations Dictate That § 1981 Does Not Create a Non-Delegable Duty.

Not only does the language and legislative history of § 1981 fail to support the existence of a non-delegable duty therein, but also compelling policy considerations dictate such a conclusion.

This Court has indicated its approval of the use of referral systems in the construction industry. *Teamsters Local 357 v. NLRB*, 365 U. S. 667 (1961). Since that case, federal labor policy has favored the use of referral systems in the construction industry by making them mandatory subjects of collective bargaining. *NLRB v. Houston Chapter, Associated General Contractors of America, Inc.*, 349 F. 2d 449 (5th Cir. 1965). Thus, a union may demand inclusion of such a provision in a collective bargain-

ing agreement. The employer must bargain in good faith respecting that demand. If agreement is not reached and the bargaining reaches impasse, the union then may bring its economic force to bear in the form of a strike. We would be remiss not to point out that this is precisely what occurred in this case.

With the interpretation given § 1981 by the courts below, and with the state of the federal labor policy being as set forth above, there now exists in the federal legal fabric the harmful incongruity that, on the one hand federal policy in substance forces a union referral system upon an employer, and on the other hand makes him absolutely liable for discrimination practiced by the union, even when the employer neither knew nor had reason to know of the discrimination. But, even if the employer knew of the discrimination, there is little if anything he could do either practically or as a matter of law to perform his non-delegable duty to insure that the union refrain from denying persons their equal rights. If the employer attempted to prevent the union's discrimination by controlling the referral system, that conduct likely would violate 29 U. S. C. §§ 158(a)(1) and (2). The central notion, therefore, underlying the imposition of a non-delegable duty upon a principal is frustrated because the principal is unable to carry out his duty.

C. Even if § 1981 Creates a Non-Delegable Duty, Glasgow Could Not Have Violated It in This Case.

Should this Court determine that § 1981 does create a non-delegable duty for Glasgow to insure that the Union refrain from denying equal rights in the operation of its referral system, that duty could not have been violated by Glasgow in this case because § 1981, this Court should hold, requires for its violation an intent to discriminate.

Fully nine of the courts of appeals[16] have either held or implied that proof of intentional discrimination is necessary under § 1981 in light of the decision of this Court in *Washington v. Davis*, 426 U. S. 229 (1976). If this Court does so hold, then the failure of contractors such as Glasgow to insure that the Union refrain from discrimination in referrals, to be actionable, must have been a racially-motivated intentional failure. Since the district court specifically found that there was a failure to prove an intent to discriminate by Glasgow, Glasgow could not have violated § 1981 (PA. 195).

1. The Relationship Between § 1981 and the Equal Protection Clause of the Fourteenth Amendment Requires the Conclusion That for § 1981 to Be Violated There Must Be a Finding of Discriminatory Intent.

§ 1981 was derived from both § 1 of the Civil Rights Act of 1866 and § 16 of the Voting Rights Act of 1870. *Runyon v. McCrary*, 427 U. S. 160, 169 n. 8 (1976). Indeed, this Court has stated that "the operative language of both § 1981 and § 1982 is traceable to the Act of April

16. *Croker v. Boeing Co.*, — F. 2d —, 26 FEP Cases 1569 (3d Cir. 1981); *Des Vernes v. Seekonk Water Dist.*, 601 F. 2d 9 (1st Cir. 1979); *Guardians Ass'n v. Civil Service Comm'n*, 633 F. 2d 232 (2d Cir. 1980), *petition for cert. filed*, 50 U. S. L. W. 3157 (U. S. Aug. 31, 1981) (Nos. 81-431, 432); *Williams v. DeKalb County*, 582 F. 2d 2 (5th Cir. 1978); *Grigsby v. North Mississippi Medical Center, Inc.*, 586 F. 2d 457 (5th Cir. 1978); *Detroit Police Officers' Ass'n v. Young*, 608 F. 2d 671 (6th Cir. 1979), *cert. denied*, 101 S. Ct. 3079 (1981); *City of Milwaukee v. Saxbe*, 546 F. 2d 693 (7th Cir. 1976); *Mescall v. Burrus*, 603 F. 2d 1266 (7th Cir. 1979); *Johnson v. Alexander*, 572 F. 2d 1219 (8th Cir.), *cert. denied*, 439 U. S. 986 (1978); *Donnell v. General Motors Corp.*, 576 F. 2d 1292 (8th Cir. 1978); *Craig v. County*

9, 1866." *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 410 U. S. 431, 439 (1973); *Runyon v. McCrary*, 427 U. S. at 171.

Following the enactment of the Civil Rights Act of 1866, some members of the Congress became concerned that the Act's application to the states may have been violative of the Constitution and that a subsequent Congress might repeal the Act. A joint resolution which addressed these concerns later became the Fourteenth Amendment. *United States v. Wong Kim Ark*, 169 U. S. 649, 675 (1898). This Court has recognized that a major impetus behind enactment of the Fourteenth Amendment was the Congressional goal of treating these issues by incorporating the provisions of the 1866 Act into the Constitution. *Hurd v. Hodge*, 334 U. S. 24, 32-33 (1948). This Court has also recognized the close relationship between the 1866 Act and the Fourteenth Amendment in stating that the two enactments were "expressions of the same general congressional policy." *Id.* at 32.

Subsequent to the passage of the Fourteenth Amendment, the Civil Rights Act of 1866 was retained in its entirety as a part of the Voting Rights Act of 1870.[17] *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 410 U. S.

16. (Cont'd.)

of Los Angeles, 626 F. 2d 659 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 1364 (1981); and *Chicano Police Officer's Ass'n v. Stover*, 552 F. 2d 918 (10th Cir. 1977). *But see Kinsey v. First Regional Securities, Inc.*, 557 F. 2d 830, n. 22 (D. C. Cir. 1977).

Obviously, the ruling of the Third Circuit in *Croker, supra*, is contradictory to the earlier ruling in the instant case by that same court.

17. Section 18 of the Voting Rights Act of 1870 provided in pertinent part: "That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted. . . ."

at 439 n. 11. Section 1 of the 1866 Act was reenacted, with minor revisions which did not alter its scope,[18] in § 16 of the 1870 Act. In 1874, § 16 of the 1870 Act was codified as § 1977 of the Revised Statutes, which today is codified as 42 U. S. C. § 1981. The language of Revised Statutes § 1977 was identical to that which constitutes § 1981, and this Court has stated that § 1977 put "in the form of a statute what had been substantially ordained by the [Fourteenth] amendment. It was a step toward enforcing the constitutional provisions." *Strauder v. West Virginia,* 100 U. S. 303, 312 (1879); *see Buchanan v. Warley,* 245 U. S. 60, 79 (1917) (§ 1977 a statute "enacted in furtherance of the [Fourteenth Amendment's] purpose.").

In addition to the common historical background and the congressional policy underlying the two provisions, a reading of the provisions *in pari materia* indicates that both are fundamentally *equal protection enactments.* Senator Trumbull, the author of the bill which was to become Section 1 of the Civil Rights Act of 1866 and eventually § 1981, in explaining its purpose stated that "any statute which is not *equal to all,* and which deprives any citizen of civil rights, which are secured to other citizens is an unjust encroachment upon his liberty . . ." Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (emphasis added).

In view of the above, it is apparent that the relationship of § 1981 and the Fourteenth Amendment is one which, for practical purposes, is so close that the two enactments are difficult if not impossible to separate on any basis. The two provisions have a common origin and directly relate to identical congressional goals.

In *Washington v. Davis,* 426 U. S. 229 (1976), this Court held that proof of a racially discriminatory intent

18. *See, Jones v. Alfred H. Mayer Co.,* 392 U. S. 409, 436 (1968).

or purpose is required in order to establish a Fourteenth Amendment equal protection violation. As a direct result of the demonstrated inseparable relationship between § 1981 and the Fourteenth Amendment, the intent standard which this Court required in *Washington v. Davis* must be applied to alleged violations of § 1981. Such a determination would be consistent with sound rules of statutory construction, which require statutes involving constitutional rights to be read in light of the Constitution, and indeed that "[t]he Constitution and the statute will be construed together as one law." *Cincinnati, No. 2 T. P. R. Co. v. Kentucky,* 115 U. S. 321, 334 (1885).

2. The Language and Legislative History of § 1981, as Well as Prior Decisions of This Court, Require a Determination That § 1981 Is Directed Only Toward Acts of Purposeful Discrimination.

There exists absolutely no indication in the language or legislative history of § 1981 which would support the extension of liability for violations thereof to other than acts of intentional or purposeful discrimination. On the contrary, in *Croker v. Boeing Co.*, — F. 2d —, 26 FEP Cases 1569 (3d Cir. 1981), the court stated "if [the language] points in any direction, it suggests a requirement for proof of purposeful discrimination." *Id.* at 1575, *citing City Memphis v. Greene,* — U. S. —, 101 S. Ct. 1584, 1602 (1981) (White, J., concurring); *Guardians Ass'n. v. Civil Service Comm'n,* 633 F. 2d 232, 267 (2d Cir. 1980). Similarly, the legislative history unequivocally demonstrates that the 39th Congress was concerned with acts of purposeful racial discrimination which would deny black citizens their basic civil rights under the laws of the land.

Justice White, concurring in the decision of the Court in *City of Memphis v. Greene, supra,* a 42 U. S. C. § 1982 case, has stated that "nothing in the legislative history of

[the 1866] Act suggests that Congress was concerned with facially neutral measures which happened to have an incidental impact on former slaves." [19] Since this Court has clearly held that Sections 1981 and 1982 are so interrelated that they should be construed similarly when applied to private forms of discrimination, *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U. S. at 440, the rationale of Justice White's opinion is fully applicable to the instant § 1981 action. The legislative history of Title VII stands in stark contrast to that of § 1981 in that the former indicates congressional concern over the impact of neutral employment practices on employment opportunities. *See Griggs v. Duke Power Co.*, 401 U. S. 424, 434-36 (1971).

Likewise, prior decisions of this Court suggest a similar result. In *Jones v. Alfred H. Mayer Co.*, 392 U. S. at 426, which involved Section 1 of the Civil Rights Act of 1866, and specifically 42 U. S. C. § 1982, this Court held that § 1 of the 1866 Act, which was a source for § 1981,

19. 101 S. Ct. at 1603. Justice White also stated that "[t]he supporters of the bill emphasized time and again that the measure was designed to eradicate *blatant deprivations* of civil rights. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 322, 339-40, 474-75, 516-17, 1123, 1151-52, 1159-60, 1833-35 (1866)." *City of Memphis v. Greene*, 101 S. Ct. at 1603 (emphasis added). *See, Croker v. Boeing Co.*, — F. 2d —, 26 FEP Cases at 1577 ("We think that it is more likely than not that the statute was addressed to such intentional conduct . . . The employees have not directed our attention to any legislative history that reveals a contrary intent. We doubt that they could"); *Guardians Ass'n v. Civil Service Com'n.*, 633 F. 2d at 267 ("It is sufficient to say that plaintiffs have been unable to cite and we have been unable to find *anything* in the legislative history to indicate that either the Thirty-Ninth Congress, which enacted the 1866 Act over a presidential veto, or the later congresses that subsequently re-enacted the provisions understood the law to prohibit anything other than the racially motivated refusal to treat whites and non-whites in the same, neutral manner").

was intended to prohibit all "racially motivated" deprivations enumerated in the statute. *Id.* And, in *Runyon v. McCrary*, 427 U. S. at 170-71, this Court held that § 1981 would be violated if a Negro offeree is not extended the same opportunity to enter into contracts as is extended to white offerees, *solely because he was a Negro. Id.* Thus, the holdings of this Court also support the view that § 1981 requires proof of purposeful or intentional discrimination.

3. Application of Other Than the Intentional Discrimination Standard to § 1981 Would Substantially Undermine Both *Washington v. Davis* and the Title VII Enforcement Scheme.

In *Washington v. Davis*, this Court indicated that the application of other than an intentional discrimination standard to the Fourteenth Amendment would raise serious questions about many existing statutes. 426 U. S. at 248. As demonstrated above, the scope of § 1981's prohibitions is virtually coextensive with that of the Fourteenth Amendment's equal protection clause. Both enactments extend well beyond the area of employment discrimination, and thus if § 1981's standard of liability is held to be less than that of the Fourteenth Amendment, the holding of *Washington v. Davis* may easily be circumvented by plaintiffs alleging a § 1981 cause of action in lieu of a Fourteenth Amendment based claim. "In fact, because § 1981, unlike the fourteenth amendment, covers not only governmental but also private conduct, an impact standard applied to § 1981 could be more intrusive than would one applied to the fourteenth amendment." *Croker v. Boeing Co.*, 26 FEP Cases at 1577 (citations omitted).

Moreover, Title VII is the regulatory scheme chosen by Congress in the employment discrimination area. Section 1981's application to this area is dissimilar to that of

Title VII in several important respects: 1) Title VII requires administrative prerequisites to suit while § 1981 has none;[20] 2) Title VII requires that attempts at conciliation be exhausted prior to initiation of suit while § 1981 does not;[21] 3) Title VII contains a two-year statute of limitations on back pay while § 1981 has no such limitation; [22] 4) § 1981 provides remedies which are distinct from those provided by Title VII.[23] All of the above-referenced differences between Title VII and § 1981 would tend to encourage plaintiffs to bypass and/or circumvent Title VII, the congressionally-chosen scheme, should this Court determine that a § 1981 violation can be sustained without proof of intent to discriminate. The number of employment discrimination cases reaching the federal court system would certainly increase, contrary to the intent of Congress in enacting Title VII.

V. In Ordering a Sweeping Remedy Imposing Obligations Far Beyond Those Necessary to Correct the Precise Violation Found, the Courts Below Exceeded the Scope of Remedial Authority.

The violations of law found by the courts below were the *Union's* discriminatory entry practices and its discriminatory implementation of a referral system which on its face was neutral and which, if operated properly, would

20. *Compare*, 42 U. S. C. § 2000e-5(e) and (f)(1) *with Johnson v. Railway Express Agency, Inc.*, 421 U. S. 454, 460-62 (1975).

21. *Compare, e.g., Occidental Life Insurance Co. v. EEOC*, 432 U. S. 355, 359-60 (1977), and *Alexander v. Gardner-Denver*, 425 U. S. 36, 44 (1974), *with Johnson v. Railway Express Agency, Inc.*, 421 U. S. at 460-62.

22. *Compare*, 42 U. S. C. § 2000e-5(g) *with Johnson v. Railway Express Agency, Inc.*, 421 U. S. at 460.

23. *See, Johnson v. Railway Express Agency, Inc.*, 421 U. S. at 461.

not have resulted in discrimination. The court found specifically that all contractors, including Glasgow, were liable not because their own employment practices in any way violated § 1981, but simply because of their relationship to the tainted Union referral system (PA. 127-28, 168).

In view of its findings that the Union discriminated in entry and in its referrals, the district court quite properly imposed various affirmative obligations upon the *Union* designed to ensure, *inter alia*, that the referral system works properly. But the court also mandated an extensive remedial scheme directed to the defendant class of contractors—a financially expensive scheme which includes *inter alia*: (1) mandatory manpower utilization quotas and monthly and quarterly reports of compliance therewith; (2) participation in a mandatory skill upgrading program; and (3) the creation of a master's position, reporting and advisory committees, and the financing thereof.[24] Such sweeping injunctive relief against Glas-

24. In paragraphs 27 through 30 of its decree, as modified by its various post-decree orders, the district court has imposed upon each of the more than fourteen-hundred "defendant" contractors specific minority manpower utilization quotas that each must meet or risk further court-imposed sanctions. In this regard, at paragraph 29, the court not only ordered that a court-appointed master, to whom broad authority was delegated under paragraphs 9 to 11, would *audit* each of the more than fourteen-hundred contractors' performance on a quarterly basis, but also placed the burden of proving a valid reason for not reaching the court-imposed minority employment quotas on the individual contractor (PA. 243).

In conjunction with its imposition of these minority employment quotas, the district court at paragraph 43, as amended, mandated the structuring of an elaborate record-keeping and reporting system wherein each of the fourteen-hundred contractor members of the defendant class is required to file with the master, a reporting committee, and the plaintiffs both monthly and quarterly reports regarding the racial breakdown of hours worked and

gow and other members of the defendant class is inconsistent with the decisions of this Court. Moreover, although not finding any wrongdoing by Glasgow, the district court nevertheless ordered Glasgow to pay five percent (5%) of the total expenses of implementing the broad decree (PA. 285). So far, the expenses incurred in the first year under the five-year decree have already amounted to approximately $200,000. The end result of such an order is that the district court is requiring Glasgow to pay money damages for the wrongs actually committed by the Union.

Clearly, there is no basis under the well-established principles of equity law for the imposition of such liability against Glasgow. This Court has admonished on numerous occasions that in fashioning an equitable remedy for a violation of law, a federal court is required to tailor the scope of the remedy to fit the precise nature of the violation. *See Dayton Board of Education v. Brinkman*, 433 U. S. 406, 420 (1977); *Milliken v. Bradley*, 418 U. S. 717, 744 (1974); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16 (1971); *see also Rizzo v. Goode*, 423 U. S. 362 (1976).[25] The principles articulated in these

24. (Cont'd.)

wages earned by operating engineers. So, too, in paragraph 44 as amended, the district court set up a detailed enforcement system based upon these reports wherein on both a quarterly and annual basis the court-appointed master is permitted to hold compliance hearings and take corrective action on allegations of non-compliance against any one or all of the fourteen-hundred contractors required to make said reports (PA. 248-49).

In addition, the court in paragraphs 24, 41, and 42 imposed upon the defendant contractors the responsibility for retraining and upgrading programs to be developed under the auspices of a master and advisory committee (PA. 240, 247).

25. Seemingly, the logical extension of this principle is that, since a person held vicariously liable is not a tortfeasor, as a matter of law that person cannot be subject to an injunction

actions brought under 42 U. S. C. § 1983 apply with equal force in the area of employment discrimination. *See EEOC v. International Union of Operating Engineers, Local 14*, 553 F. 2d 251, 256 (2d Cir. 1977) (district court "should interfere with the defendant's operations no more than is necessary to [remedy the wrong]."); *Sledge v. J. P. Stevens & Co.*, 585 F. 2d 625, 650 (4th Cir. 1978) (vacating district court's imposition of quotas on the ground that the violations "are rectified by other of the injunctive provisions").

In light of these controlling principles, the district court, in fashioning its remedy, went far beyond the nature and extent of the violation proved. Therefore, this Court should direct the removal from the decree of all portions thereof which pertain to Glasgow, including that portion which specifically imposes the five percent (5%) financial obligation upon Glasgow.

Quite specifically, the district court, in accord with the plaintiffs' allegations,[26] found that the Union discriminated against minorities: (1) in entry into the Union; (2) in entry into the hiring-hall system; and (3) in actual selection for referral to work from the hiring-hall lists (PA. 30, 162). Accordingly, if these three discriminatory

25. (Cont'd.)

relating to the tort for which he is held vicariously liable. *See, EEOC v. Enterprise Association Steamfitters*, 542 F. 2d 579, 589 (2d Cir. 1976), *cert. denied*, 430 U. S. 911 (1977); J. Pomeroy, *Equity Jurisprudence* § 1338 (5th ed. 1941).

26. As the district court stated: "plaintiffs' allegations of discrimination are not directed against the hiring hall system per se but against the *Union's alleged intentional refusal to follow their own hiring hall rules*, thus causing intentional discrimination against and a discriminatory adverse impact on minorities. Plaintiffs *also allege* discrimination particularly in *admission into the Union* and *admission into the job referral process*" (emphasis added) (PA. 30).

practices did not exist, there would have been no basis upon which the district court could have relied to find that the Union denied minorities the opportunity to gain work as operating engineers. Therefore, for purposes of injunctive relief, if these three discriminatory practices are remedied by the court's injunction, the underlying basis of the Union's discrimination will have been cured. Clearly, this goal has been reached through the district court's specific imposition of affirmative entry and referral quotas upon the Union in its decree.

CONCLUSION

In view of the foregoing, the judgment of the court of appeals as to Glasgow should be reversed and this Court should remand for entry of judgment in Glasgow's favor and for modification of the injunction so as to exclude Glasgow from its terms.

Respectfully submitted,

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No. 81-332

IN THE

Supreme Court of the United States

GLASGOW, INC.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY TO BRIEFS OF INDIVIDUAL AND CLASS AND COMMONWEALTH RESPONDENTS

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No. 81-332

IN THE

Supreme Court of the United States

GLASGOW, INC.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, and RAYMOND WILLIAMS, et al.,

Respondents.

REPLY TO BRIEFS OF INDIVIDUAL AND CLASS AND COMMONWEALTH RESPONDENTS *

ARGUMENT

I. Introduction.**

Respondents' presentations to this Court are filled with mischaracterizations, inaccuracies and misrepresentations of the record and of the opinion of the district court. Respondents' legal arguments contain sweeping generalities in which bald conclusions are arrived at without the

* All references to the Appendix to Petitions for Certiorari will be designated by "PA. ____"; all references to the Joint Appendix on Writ of Certiorari will be designated by "JA. ____". Petitioner Glasgow's principal brief is cited as "Pet. Glasgow Br.", and the brief for Individual and Class Respondents is cited as "Resp. Ind. Br.". References to trial transcript will be designated by "____ day, ____". References to Union trial exhibits will be designated by "U- ____".

** Petitioner Glasgow incorporates herein by reference the discussions of the All Writs Act, 28 U. S. C. § 1651, contained in the Reply Briefs of Bechtel Power Corporation and the CAEP and UCA.

benefit of any meaningful legal reasoning. Likewise, Respondents' citation to authority relied upon to support their propositions are often misleading. This plethora of difficulties compels this Petitioner to respond.

Initially, it must be made clear that the district court *did not find* that Glasgow had engaged in any discrimination against minorities.[1] Thus, the district court did not hold that Glasgow violated § 1981, nor that it denied to minorities the same right to make and enforce contracts as was enjoyed by whites. Rather, the district court held that Glasgow was liable vicariously, at least injunctively, for the Union's intentional discrimination in breach of § 1981.[2] The question whether responsibility for the Union's discrimination can be lodged beyond the Union itself is what this Court must determine.

It should also be noted that Glasgow neither seeks nor claims any exemption from the requirements of § 1981. Glasgow recognizes that it, as any other employer, is subject to the duty imposed by § 1981. It cannot rid itself

1. At trial, Respondents attempted but failed to prove that Glasgow itself—separate and apart from the claim involving imputation of liability—engaged in employment practices violating § 1981. (PA. 128-32). No appeal was taken from this ruling. Since the opportunity to establish liability is over, the district court's comments respecting further "evaluation" of Glasgow's practices has no merit. *See, Montana v. United States,* 440 U. S. 147, 154 (1979).

2. The opinion of the district court refers several times to vicarious liability. However, in at least two places, it refers to an "affirmative duty" under § 1981 of Glasgow and other employers to "prevent discrimination" (PA. 186) or "to see that discrimination does not take place in the selection of [its] work-force", calling this a non-delegable duty. The import of the opinion is that this duty was breached by Glasgow and the other employers. Although this smacks of a direct violation under § 1981, the opinion—perhaps erroneously—calls it "respondeat superior" liability. *See* Pet. Glasgow Br. 20-31.

of that duty and never used the Union or anyone else as a shield for that duty. However, the intentional discrimination which the district court found to have violated § 1981 did not take place in Glasgow's workforce, but rather was practiced by the Union in referral from its hiring-hall. Thus, for the reasons set forth in its brief on the merits, Glasgow cannot be liable in this case for the Union's violation of § 1981.

II. Respondents' Discussion of the Evolution of the Affirmative Action Program as Well as Their Discussion of the Joint Apprenticeship and Training Committee Is Irrelevant and Misleading.

Throughout their briefs, both the Commonwealth and the Individual and Class Respondents discuss the Affirmative Action Program ("AAP") and its relation to the Union's federally-granted exemption from the Philadelphia Plan, as well as the finding of discrimination against the Joint Apprenticeship and Training Committee ("JATC"). The discussion of these matters in Respondents' briefs progresses as if this information is somehow relevant to the matter at bar. It is not. However, for purposes of clarification, Glasgow herein will engage in a brief discussion of these matters.

A. The District Court Did Not Find That Any Law Had Been Violated by Glasgow or Any Other Employer Through the Associations' Execution of the Affirmative Action Program.

Notwithstanding Respondents' assertions to the contrary, the district court did not find that any association or employer violated the law by any association's signing of the so-called AAP (PA. 198). Quite to the contrary, the district court grounded the Petitioners' vicarious liability under § 1981 for the acts of the Union solely "as a

result of their contractual relationship to and use of a hiring hall system which in practice effectuated racial discrimination, whether or not the employers and associations knew or should have known" (PA. 168). In addition, it is noted that the AAP was an alternative to the so-called Philadelphia Plan only insofar as the Plan's reporting requirements related to work to be performed by the operating engineers' craft.[3]

The initial Philadelphia Plan came into existence on November 30, 1967, when the United States Department of Labor approved the Philadelphia Pre-Award Plan as a vehicle for providing affirmative action in employment among certain government contractors. As initially devised, the Plan itself was extremely limited in application for it applied only to federally-funded construction projects which were to exceed $500,000 and which were to be located in the immediate five-county Philadelphia area (JA. 173).[4]

The operating engineers' trade was among the eight Philadelphia-based construction trades originally listed within the coverage of this Philadelphia Plan. Under this Plan, the apparent low-bidder was required to submit a specific manning table for minority employment for each of the eight trades involved. The first construction project affected by this newly devised Philadelphia Plan was awarded to a non-Pennsylvania contractor in April

3. Despite the signing of the Affirmative Action Program documents, no contractor was relieved from following the Philadelphia Plan's specific minority manpower utilization requirements for the other Philadelphia-based construction trades. These trades included the Iron workers, Plumbers and Pipefitters, Sheet Metal workers, Electrical workers, Roofers and Elevator construction workers.

4. In contrast, Local 542's geographical jurisdiction covered all thirty-three counties of Eastern Pennsylvania and the entire State of Delaware.

of 1968. However, the contractor was unwilling to submit to a specific manning table for operating engineers because it was required to use Local 542's exclusive hiring hall referral system (U-312; 132nd day, 12067). Against this background, representatives of the U. S. Department of Labor summoned association representatives to a meeting in Washington, D. C. (132nd day, 11945). At this meeting, the Department of Labor officials presented the Associations' representatives with an *already-drafted* Affirmative Action Program document. Once that document was executed, the Union, but no other trade, was considered to be outside the coverage of the Philadelphia Plan. Although the Union later advised the U. S. Department of Labor of the inaccuracy in the Program document of its assertion as to the number of minorities affiliated with it, the U. S. Department of Labor opted not to reinsert the Union within the Philadelphia Plan coverage when it revised the Philadelphia Plan in June, 1969. Furthermore, the district court found that the signatory Associations had no actual knowledge of the inaccuracy (PA. 198).

Moreover, it is important to note that the record evidence reveals that prior to the signing of the Affirmative Action Program document neither Glasgow nor any contractor-member of Petitioner Associations ever had any federal job funds withheld from it pursuant to the Philadelphia Plan's requirement for the insertion of minority manning tables in a covered Philadelphia Plan contract (132nd day, 11955-56).

B. The District Court's Finding of Liability on the Part of the JATC Did Not Serve as a Basis of Liability as to Glasgow or Any Other Employer.

Quite contrary to the Respondents' assertion, the district court did not premise any liability on the part of

Glasgow or any employer on any conduct of the JATC. It is imperative to note that the district court did not hold that anyone other than the JATC itself was liable for its discrimination. The district court did not hold that the JATC trustees were the agents of any principal, and it is worthy of note that such a finding would have been improper under this Court's decision in *NLRB v. Amax Coal Co.*, 101 S. Ct. 2789 (1981), which decision makes clear that the trustee's duty is to the beneficiaries of the trust to the exclusion of the interests of all others. It was stated therein that "the duty of the management-appointed trustee of any employee benefit fund . . . is directly antithetical to that of an agent of the appointing party." *Id.* at 2795.

III. Glasgow Cannot Be Liable for the Union's Violation of § 1981.

A. Respondents' Non-Delegable Duty Argument Is Without Merit.

Glasgow recognizes that the duty imposed by § 1981 is of a personal nature. That duty may not be delegated to another such that Glasgow would be held harmless for a breach of its duty. However, in this case Glasgow did not breach its duty under § 1981. Rather, § 1981 was violated when the Union breached the duty it owed to the plaintiffs. As a result of their difficulty in supporting the district court's holding of vicarious liability, Respondents assert that § 1981 created a duty analogous to a non-delegable duty—a duty to assure that others do not practice racial discrimination—to hold Glasgow liable. For the reasons set forth herein as well as in Glasgow's principal brief, this argument is unavailing. *See,* Pet. Glasgow Br. 20-31.

1. Section 1981 Does Not Give Rise to a Non-Delegable Duty.

The main thrust of Respondents' argument is that § 1981 imposes a non-delegable duty upon Glasgow such that the Union's discrimination in referral is attributable to Glasgow even if Glasgow had no knowledge or reason to know of any discrimination being practiced by the Union.[5] Section 1981 does not permit such an interpretation.

In seeking to determine legislative intent when undertaking the task of interpreting a statute, the three factors traditionally relied upon by the judiciary are "the language and focus of the statute, its legislative history, and its purpose." *Touche Ross & Co. v. Redington*, 442 U. S. 560, 575-76 (1979), *citing Cort v. Ash*, 422 U. S. 66, 78 (1975). As stated in Glasgow's principal brief, nothing in the language or legislative history of § 1981 gives rise to the asserted non-delegable duty—the duty to prevent discrimination by others—*and* when such a duty arises from a statute, that duty must be clearly expressed in the statute. Apparently, this is not enough to dissuade Respondents who conclude without evidence of any cogent legal

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5. The court below invoked *respondeat superior*, a concept based upon the relationship of master and servant, to justify its imputing vicarious liability to employers such as Glasgow. Respondents do not seriously attempt to bolster the district court's finding of liability on the basis of *respondeat superior*. Indeed, they cannot do so since, as demonstrated in Glasgow's principal brief, employers such as Glasgow do not have the right to control the actions of the Union necessary to create a master-servant relationship. Instead, Respondents focus their attention on the asserted existence of a non-delegable duty on the part of the employers, apparently conceding thereby that Local 542 must be viewed at most as an independent contractor and not a servant.

reasoning that § 1981 does indeed give rise to such a duty.[6]

In *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U. S. 77, 97 (1981), this Court cautioned against adding new remedies in the absence of a determination that these remedies were contemplated by the Congress. In that case, as here, the question of liability "is entirely a creature of federal statute."[7] While the Court noted that most statutory schemes require some judicial interpretation, it stated that "the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt."[8] Since there is no other basis whatever for holding Glasgow liable, Respondents urge this Court to read a non-delegable duty into § 1981. In the absence of any indication of Congressional intent in this regard, this Court must heed its admonishment in *Northwest Airlines* and not fashion such a new rule of liability for § 1981.

Should this Court find the equitable considerations advanced by Respondents to be compelling, it still cannot attach a non-delegable duty to § 1981. As was noted in *Northwest Airlines, supra* at 98, n. 41, those equitable considerations should be addressed to Congress rather than the federal courts. In *United States v. Gilman*, 347

6. The language of § 1981 is not directly addressed to anyone, nor does it expressly create any duties. It speaks simply of the rights of all persons to make and enforce contracts on the same basis as whites. By reference to the express terms of § 1981 then, liability may only be imposed for the denial to black persons of the right to contract on the same basis as whites. In this case there has been no finding that Glasgow denied to blacks this right. Only the Union was found to have denied blacks the right secured by § 1981.

7. 451 U. S. at 97.

8. *Id.*

U. S. 507 (1954), a case such as this involving the interpretation of a federal statute, this Court instructed:

> [T]he claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriate for those who write the laws, rather than for those who interpret them.[9]

Finally, this Court has been hesitant to impose liability based on the doctrine of non-delegable duty. *See Logue v. United States*, 412 U. S. 521, 529 n. 7 (1973). In that case, the "duties" required under 18 U. S. C. § 4042 were specifically enumerated in direct contrast to the generalized right set forth in § 1981. Yet, even there a non-delegable duty was not found to have arisen.

2. The Cases Relied Upon by the Respondents Do Not Support a Finding of Liability of Glasgow Under the Principle of Non-Delegable Duty.

Beyond the question of the interpretation of § 1981 not permitting the creation of a non-delegable duty by the judiciary, which question Respondents have not addressed, Respondents seek to demonstrate that the principle of non-delegable duty operates in this case to hold Glasgow liable by reference to a 1918 New York case and a number of civil rights cases. None of the cases relied upon remotely supports the proposition that an employer such as Glasgow is liable for intentional discrimination practiced by a union in its operation of a referral system, in the absence of knowledge or reason to know.

9. 347 U. S. at 511-13.

In *People ex rel, Price v. Sheffield Farms-Slawson Decker Co.*, 225 N. Y. 25, 121 N. E. 474 (1918), the employer was found to have violated the New York law against employing children, which law expressly imposed duties upon employers. One of the employer's drivers had seen fit to employ a child contrary to a rule the employer had promulgated, as well as the law. The court held the employer responsible since the violation of the law was committed by an employee of the employer within the course of employment (a servant). Surely, that case can have no bearing where, as here, the violation was committed by the Union, not a servant of Glasgow.

Respondents also seek to rely upon "Title VII and § 1981 [cases] hold[ing] employers responsible for their hiring agents' intentional discrimination" (Resp. Ind. Br. 26) for the proposition that the duty imposed by § 1981 is non-delegable. In every one of the cases cited by the Respondents the 'hiring agent' was an employee-supervisor of the employer. The discrimination of the supervisor was chargeable to the employer under the principle of *respondeat superior*; non-delegable duty was not a basis of liability in any of the cases.

The cases involving the fair housing laws which Respondents' cite are also wholly unsupportive of the presence of a non-delegable duty in § 1981. Although some of these cases allude to the non-delegable duty principle, all of the cases involve liability of masters or principals for the intentional acts of discrimination perpetrated by their employee-servants. In not one of the cases in which non-delegable duty is mentioned is there any analysis of the concept. Rather, its existence is merely assumed in passing and, in fact, is *dicta* since the cases impute liability vicariously.[10]

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10. There is simply no reason to assume that because of Title VIII's proscriptions against discrimination in the sale of real estate,

The Fourteenth Amendment state action cases cited by Respondents also are wholly inapposite. None of the cases even mentions the non-delegable duty principle but rather are directed to the specific issue as to when the involvement of the state is sufficient for a violation of the equal protection clause contained in Section 1 of the Fourteenth Amendment to be made out. These cases have nothing whatever to do with the question of the interpretation of a federal statute—§ 1981—in order to determine precisely what duty or duties it creates.

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10. (Cont'd.)

Section 1981 creates a non-delegable duty in the area of employment. Unlike Title VIII's ban on discrimination, Section 1981's declaration against non-discrimination cannot be viewed in a vacuum. Rather, it must be read in harmony with the pervasive regulatory scheme created by the National Labor Relations Act. *See Emporium Capwell Co. v. Western Additional Community Organization*, 420 U. S. 50 (1975). When viewed in the context of the National Labor Relations Act, the employers' entering into an exclusive hiring hall system in the instant case cannot possibly subject them to liability on the theory of breach of a non-delegable duty.

In *Teamsters Local 357 v. NLRB*, 365 U. S. 667 (1961), the Supreme Court specifically rejected the NLRB's contention that hiring halls were inherently discriminatory, and approved of their use. The Court noted that hiring halls in the construction industry have long been recognized as the most economic and efficient manner of allocating jobs in a transitory work situation. 365 U. S. at 672. In fact, a union's demand for an exclusive hiring hall provision is a mandatory subject of bargaining under the NLRA. *NLRB v. Houston Chapter, Associated General Contractors of America, Inc.*, 349 F. 2d 449 (5th Cir. 1965). In view of these expressions of our national labor policy, it borders on the ridiculous to suggest that employers who have entered into a bona fide hiring hall arrangement can be held vicariously liable for the Union's acts of discrimination on the theory that Section 1981, which by its language imposes no duty on any specific individual, creates a non-delegable duty to prevent discrimination by a union.

3. Even if § 1981 Gives Rise to a Non-Delegable Duty, Intent Is Required for Its Violation.

Despite Respondents' assertion to the contrary, Glasgow did not concede in the court of appeals, and does not concede before this Court, that it is not necessary to resolve the question of whether proof of intent is required to establish a § 1981 violation. In fact, Glasgow's position on this specific question was set forth in its brief to the court of appeals. *See* Glasgow Ct. Apps. Br. 14-15.

In accordance with its principal brief at pp. 24-31, Glasgow's position is that should this Court determine that the asserted non-delegable duty exists in § 1981, then a resolution of this question of intent is mandated. A finding by this Court that proof of intent is required under § 1981 would mean even a non-delegable duty cannot be used as a vehicle for imposing liability upon Glasgow. Simply stated, the district court found that the plaintiffs have failed to show that Glasgow intended to discriminate (PA. 195), and plaintiffs would have to have made such a showing to hold Glasgow liable for breach of any non-delegable duty.

B. The Hiring-Hall Was Not a Joint Enterprise.

The Individual and Class Respondents engage in a re-drafting of the district court's opinion when they state that the district court, in the alternative, held that the hiring-hall was a joint enterprise of the Union and the contractors, acting as agent for each. To the contrary, the district court did not make any alternative holding, and never even used the term "joint enterprise". The district court did hold that that "the union hiring hall was the agent" of the contractors (PA. 191). However, Glasgow has conclusively demonstrated in its brief on the merits that in no way could the relationship between

Glasgow and the Union be characterized as that of principal-agent. The district court did not hold, nor did it even mention, that Glasgow was liable in the alternative because the hiring hall was a joint enterprise of Glasgow and the Union. Thus, Respondents' counsel has misleadingly attempted to re-write the opinion of the district court and to present this Court with a basis of liability that has not been heretofore advanced or addressed by any party in this case.[11]

Notwithstanding the Respondents' mischaracterization of the opinion of the district court, the law that has developed in the area of "joint enterprise" clearly compels the conclusion that just as the hiring-hall cannot be said to be the agent of Glasgow, similarly, Glasgow and the Union cannot be said to have embarked upon a joint enterprise through Glasgow's coerced agreement to the hiring-hall system. The four elements which must all be present for a joint enterprise to exist may be found in the Restatement (Second) of Torts § 491:

> (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

11. Respondents rely upon the case of *Stockwell v. United States*, 80 U. S. 531 (1879), to support their contention that the hiring-hall was a joint enterprise of Glasgow and the Union. In fact, the business arrangement in *Stockwell* was a partnership, not a joint enterprise. As the Court stated: "By the arrangement he [Stockwell] became a partner with them in the shingle business." *Id.* at 544. Thus, Stockwell's tortious acts were attributable to his partners. Respondents have not and cannot seriously contend that Glasgow and the Union were partners, and therefore *Stockwell* is wholly unsupportive of their claim of the existence of a joint enterprise.

Certainly, the requirement that there be a community of pecuniary interest between Glasgow and the Union cannot be satisfied. The relationship between employer and union which is delineated in the National Labor Relations Act, specifically 29 U. S. C. § 158(a)(2), does not ever permit the existence of such a community of pecuniary interest.

Respondents seek to have this Court view the Union hiring-hall as a joint construct of the employers and associations on the one hand, and the Union on the other. Such a characterization is misleading. The hiring-hall has no meaningful existence separate from the Union. Indeed, the collective bargaining agreements require employers to request referrals from the Union, *not* any hiring-hall.

As an employer, Glasgow would simply phone the appropriate Union hiring-hall and inform the Union dispatcher on duty of its need for an operator. In return, an operator would show up for work as requested. The evidence was clear that the dispatcher, and indeed all persons with any responsibility whatever for the operation of the hiring-hall referral-system were employees of the Union. Neither the contractors nor the associations had anything at all to do with the operation of the system.

Moreover, Glasgow did not have an equal right to control the operation of the hiring-hall so that the fourth element of a joint enterprise is not satisfied in this case. The element of control will be fully explored in Part C, *infra*.

C. Glasgow Had No Right to Control the Union Hiring-Hall.

Analyzing the element of control, the district court simply stated that the employers were entitled to a hiring-hall operation which adhered to the terms of the collective

bargaining agreement, one term of which prohibited racial discrimination (PA. 193). The right to control focuses not on the *results* of the actor's performance, but rather on whether the principal retains the right to direct the *manner* of the actor's performance.[12]

Even as found by the district court, the facts indicate that an employer such as Glasgow did not have the right to control the Union's manner of achieving the ends specified in the collective bargaining agreement. Plainly, the mere recitation in the collective bargaining agreement of the details of the service which the Union was to provide an employer does nothing more than describe with a certain degree of specificity the result which the Union

12. Respondents assert that the conclusion of the district court that petitioners did retain power over the hiring process (i) has not been challenged, and (ii) is a finding of fact which cannot be set aside unless clearly erroneous. First, the question of right to control has been extensively addressed by all of the Petitioners both before this Court and in the court of appeals. Second, the question of the right to control the hiring process is by no means a finding of fact, but rather is clearly a conclusion of law which is reached through an analysis of the facts since it is one of the elements which must be established in attempting to hold one liable vicariously. Third, even if this Court would characterize the determination of the question of the "right to control" as a finding of fact, this Court still has plenary review of the matter because the conclusion of the district court on this question is based entirely upon its reading of applicable provisions of the collective bargaining agreements. It is well established that lower court interpretations of written documents are freely reviewable by appellate courts. *See, e.g., Bowles v. Carnegie-Illinois Steel Corp.*, 149 F. 2d 545, 546 (7th Cir. 1945); *Grove Laboratories v. Brewer & Co.*, 103 F. 2d 175 (1st Cir. 1939); *United States v. Corporation of President of Church*, 101 F. 2d 156, 160 (10th Cir. 1939); *Wilson v. San Francisco Municipal Railway*, 29 Ca. App. 3d 870, 105 Cal. Rptr. 855 (1973); and *Federation of Teachers, Local 2042 v. State*, 514 P. 2d 784 (Colo. App. 1973).

must achieve. In *Logue, supra,* this Court stated that the "critical factor . . . is the authority of the principal to control the detailed physical performance of the contractor." [13] In this case it is undisputed that Glasgow had no right to control the physical performance of the Union dispatchers whose job it was to see that the Union hiring-hall was run in accordance with the rules set forth in collective bargaining agreements.

To further support their claim that Glasgow had a right to control the hiring-hall, Respondents assert that Glasgow, through the grievance procedure, had a right equal to the Union's to enforce the collective bargaining agreement's hiring-hall rules as well as its non-discrimination clause. First, even assuming that this assertion is correct, which Glasgow does not, an equal right to enforce the rules and the non-discrimination clause does not amount to a right to control the day-to-day operation of the hiring-hall. The right to enforce is analogous to the

13. 412 U. S. at 528-29. The petitioner in *Logue* contended that the statute involved, 18 U. S. C. § 4042, imposed "a duty on the Bureau of Prisons to provide for the safe-keeping, care and subsistence of all persons . . ." *Id.* at 529. This Court noted that the county provided custody in accordance with rules and regulations of the Bureau of Prisons which specified treatment standards, discipline methods and rules on such matters as employment, visitation privileges, and attorney communications. Because of the matrix of federal rules and regulations, it was petitioner's contention that the employees of the county jail were employees of the federal government rather than employees of an independent contractor. This Court held that even though the federal government retained the right to inspect the facilities, it had no authority to "physically supervise the conduct of the jail's employees" and thus they were held to be employees of an independent contractor. *Id.* at 531. Similarly, although there are rules governing the operation of the hiring-hall system in this case, Glasgow did not have either the authority or the ability to "physically supervise the conduct of the Union's employees" in their operation of the system.

right to receive the results agreed upon or bargained for. However, this right is distinguishable from the right to control the day-to-day manner of physical performance. Glasgow simply does not possess the right to control the Union's manner of performance in the operation of its hiring-hall.

Secondly, the only vehicle at the disposal of Glasgow to enable it to enforce the hiring-hall rules was the grievance and arbitration machinery of the collective bargaining agreement. Obviously, in no way can its access to the grievance procedure be said to give Glasgow the requisite right to control the day-to-day manner of physical performance of the operation of the hiring-hall system.

Finally, Respondents' assertion that Glasgow retained a right to enforce the collectively-bargained rules governing the hiring-hall, as well as the non-discrimination provision, is, as a practical matter, valueless. Simply stated, in order for Glasgow to take steps to enforce the contractual rules or the non-discrimination clause through the grievance procedure, it first had to be aware that violations were taking place. Knowledge is the springboard for filing of a grievance. However, the district court found that Glasgow did not know, nor had any reason to know, that some of the Union's dispatchers were abrogating the agreement's referral rules.[14]

14. The importance of the presence of the element of knowledge in order for liability to attach for union hiring-hall conduct has, of course, been recognized by cases decided under the National Labor Relations Act. *See,* Pet. Glasgow Br. 14-16.

CONCLUSION

In view of the foregoing, the judgment of the court of appeals as to Glasgow should be reversed and this Court should remand for entry of judgment in Glasgow's favor and for modification of the injunction so as to exclude Glasgow from its terms.

Respectfully submitted,

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